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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,

Respondents.

Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Respondents raise a number of new matters in their briefs in opposition. None undercut, and some support, the importance of this Court's review of the decision below.[1]

1. In the interest of brevity, petitioners omit any extended discussion of respondent TRPA's statement of the case, other than to point out two misstatements. The statement at page 6 of respondents' brief that petitioners' parallel state court action "was dismissed and no appeal has been taken therefrom" is apparently intended to create the impression that there was a ruling by a state court upon these claims. That is false; the state court action referred to was voluntarily dismissed without prejudice by petitioners. Second, the discussion at pages 5-6 of respondents' brief implies that petitioners have failed to exhaust administrative remedies. That argument is entirely irrelevant to the issues here, and neither the District Court nor the Ninth Circuit ruled on that issue.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents Important Questions Concerning the Application of the Eleventh Amendment to Entities Created by Interstate Compact.

Respondents attempt to equate TRPA to a state for purposes of the Eleventh Amendment by dwelling on the importance of the Lake Tahoe Basin as a natural resource, not just to its immediate area but to the region and the nation. They also stress the political difficulties encountered in governing this resource because it falls across the border between California and Nevada. (Brief of Certain Respondents In Opposition to Petition, pp. 17-19.) Tested by the guiding principles of this Court's decisions, however, including *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a separate political subdivision such as TRPA cannot be equated with the sovereign states for purposes of applying the Eleventh Amendment. While, as all here agree, TRPA's geographical jurisdiction crosses state and county lines, it does not on that account cease to be a subordinate unit of government, and it should not on that account escape the power of the federal courts to enforce the constitutional guarantee of due process of law. The Ninth Circuit's blanket application of the Eleventh Amendment to all entities created by interstate compacts is unprecedented and unsound.

A. THE NINTH CIRCUIT'S APPLICATION OF THE ELEVENTH AMENDMENT TO ALL COMPACT ENTITIES IS ERROR AND SHOULD BE REVIEWED.

Respondents make much of the assertion that only one district judge has previously declined Eleventh Amendment immunity to a compact entity. (Brief for Certain Respondents In Opposition to Petition, pp. 10, 12.) If only the ultimate result were important, petitioners would respond by citing this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the result was a denial of such immunity. But it is not the result in the cited decisions that is significant, and petitioners do not quarrel with them. What is significant is the reasoned analysis of the particular agency employed by the courts of the Second and Eighth Circuits, in compliance with this Court's decisions in other Eleventh Amendment cases. The Ninth Circuit failed to do that, adopting instead a *per se* rule that compact entities are immune and alternatively relying on the Eighth Circuit's *Petty* decision, where the underlying facts were completely different from those here.

Respondents also urge that "[i]t does not require great sophistication to conclude that an agency created by separate sovereign states . . . is greater than or at least tantamount to its creators." (Brief of Certain Respondents In Opposition to Petition, p. 14.) Certainly it is true that *geographically* TRPA's jurisdiction extends farther than that of either state alone. Politically, however, that is not true, for here Nevada and California combined to create not a governmental equal or a common arm, but a separate *political subdivision* that overlaps their boundary. If either had created a similar entity alone, it would undoubtedly not be immune under the Eleventh Amendment and the controlling decisions of this Court. But because the states acted together, so respondents argue, the whole is somehow greater than the sum of its parts. It is not. No court, other than the Ninth Circuit in this case, has ever held that a political subdivision is immune under the Eleventh Amendment merely because it was created by interstate compact.

B. UNDER THE APPLICABLE STANDARDS, THE NINTH CIRCUIT ERRED IN GRANTING TRPA IMMUNITY.

Respondents contend that the Ninth Circuit's opinion granting TRPA Eleventh Amendment immunity is sup-

ported by the same "critical elements" relied upon by the Eighth Circuit in *Petty v. Tennessee-Missouri Bridge Commission*, 254 F.2d 857 (8th Cir. 1958), *reversed*, 359 U.S. 275 (1959). Since the Ninth Circuit relied upon its *per se* rule that the Eleventh Amendment immunizes all agencies created by interstate compact, it engaged in no reasoned analysis of the "critical elements" underlying the Eighth Circuit's opinion.

Respondents recognize that under this Court's decisions one central issue is whether this suit will "impose a liability which must be paid from public funds in the state treasury," *Edelman v. Jordan*, 415 U.S. 651, 663 (1973). Respondents argue that it will because, they say, (1) most of TRPA's funding comes from state and federal government; (2) the funding required of local governments is imposed by action of the states in adopting the Compact; and (3) the treasuries of the states are ultimately accountable for monetary relief against TRPA. (Brief of Certain Respondents in Opposition to Petition, p. 16.)

There is no support in the record for respondents' assertion that most of TRPA's funding comes from state and federal government. As the petition for certiorari points out, the only funding mandated by the Compact for TRPA is its power to assess local governments. (See Petition for Certiorari, pp. 6, 21; Compact Art. VII(a).) It is this by which TRPA's status must be determined.

Such minor appropriations, if any, as the states may make for TRPA are purely a matter of grace. They no more transform TRPA into a state agency for Eleventh Amendment purposes than the receipt of similar monies by the City of San Francisco would transform it into a state agency or the receipt of even "a significant amount of money from the State" transformed the Mt. Healthy City School District into an agency of Ohio. *Mt. Healthy City School*

District Board of Education v. Doyle, supra, 429 U.S. at 280. Nor are TRPA's receipts of federal funds, which it generally receives for services rendered under contracts with departments of the federal government,[2] relevant to the Eleventh Amendment issue.[3]

In any event, the sources of TRPA's revenues are not the real issue. The crucial point is not the source of the monies in TRPA's bank account, but the fact that a judgment against TRPA would be paid from that bank account and not from the state treasury of either California or Nevada. Respondents' assertion to the contrary, citing NRS 41.035(9)[4] and *Williams v. Horvath*, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), is wrong as a matter of law. Both Chapter 41 of the Nevada Revised Statutes and Sections 825-825.6 of the California Government Code, construed in *Williams v. Horvath*, concern the indemnification only of *public officers and employees* by the employer state or political subdivision for liabilities incurred by them in the course of their public employment. Whatever TRPA may be, it is not a public officer or employee, as defined in either statute, and, therefore, it is not entitled to indemnification by either state. On the contrary, Article VII(f) of the Compact expressly insulates the states from any liability TRPA may incur.

The Ninth Circuit failed to consider this fact or any other aspect of TRPA's structure and funding, since it adopted a *per se* immunity rule.

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2. Article VII(b) of the Compact authorizes TRPA to collect fees for services rendered. See Petition for Certiorari, p. 6, n.2 and p. 21, n.21.

3. No one asserts that TRPA is a federal agency, and both the District Court and the Ninth Circuit ruled that it was not. See Petition for Certiorari, Appendix A at 13 and Appendix D at 62. No question of federal sovereign immunity is presented here.

4. The intended reference is presumably NRS 41.0337(9) (1977).

II. This Case Is Ripe for Review.

Respondents Briner and Henry suggest that this case is not ripe for review, citing *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company*, 389 U.S. 327 (1967). (Brief for Respondents James Henry and William Briner in Opposition to Petition for Certiorari, pp. 15-16.) There this Court denied the petitioning union's application for a writ of certiorari, stating in a per curiam opinion that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." 389 U.S. at 328. Here, too, the Court of Appeals has remanded the case, for development of factual findings as to the "legislative" or "executive" nature of the actions of the individual defendants. But this case is entirely different from the *Brotherhood* case and is properly governed by the rule stated in *United States v. General Motors Corp.*, 323 U.S. 373 (1945), and followed in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), and *Land v. Dollar*, 330 U.S. 731 (1947).

The appeal in *Brotherhood* was from assessment of a penalty for an alleged contemptuous violation by the union and its president of a restraining order forbidding a strike. The union petitioned for certiorari on issues concerning the legality of the contempt order that the Court of Appeals had decided against it. This Court denied review because the Court of Appeals had also remanded for a hearing on whether the petitioners were in fact in contempt at all. A ruling in their favor on remand would have mooted the issues for which they sought review, and those issues were all completely unrelated to the course of the main action.

In *General Motors*, in contrast, the Court of Appeals had remanded for trial to permit evidence on damage issues as to which the district court had refused an offer

of proof. In *Larson* and in *Land*, the Court of Appeals had remanded for trial of factual jurisdictional issues concerning sovereign immunity on which the district court had granted motions to dismiss. In all three cases this Court granted certiorari because the correctness of the rulings on the questions involved was "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. at 377; *Larson v. Foreign & Domestic Corp.*, 337 U.S. at 685, n.3; *Land v. Dollar*, 330 U.S. at 734, n.2.

Here, too, the Ninth Circuit's rulings are fundamental to the further conduct of the case. The Ninth Circuit's rulings, in effect, deny petitioners any remedy at all in damages in federal court for an unconstitutional taking of their property. TRPA, the agency which took the property, is given absolute immunity by the Ninth Circuit, and all the members of TRPA are also given absolute immunity except under narrowly confined circumstances where they may be said to be acting in an "executive" capacity. Thus, while the Ninth Circuit agrees that petitioners are entitled to a damage remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), its broad extension of immunity to anyone who may be liable for the wrong renders that remedy entirely illusory. That ruling will obviously and profoundly affect the entire conduct of the case, the scope of discovery, the issues to be tried, and the relief petitioners can obtain. It is not tangential to the action, as were the rulings of the Court of Appeal in *Brotherhood, supra;* it goes to the heart of it. And, unlike the rulings in *Brotherhood*, the issues decided here cannot be rendered moot by the hearing on remand. TRPA's status under the Eleventh Amendment cannot under any circumstances be affected by findings

on the capacity in which the individual defendants acted, and it is extremely unlikely that the hearing on remand will moot even the question whether the individual defendants enjoy absolute immunity in their "legislative" capacities. In short, this case is indeed ripe for review in this Court.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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